NO. 84-103

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC.
AND MAX A. STRAUSS,

Petitioners,

vs.

ESTATE OF ALMA RICHARDSON,
VERNEDA BENTLEY, ADMINISTRATRIX,

Respondent.

ON WRIT OF CERTIORARI
TO THE OHIO EIGHTH DISTRICT
COURT OF APPEALS

PETITIONERS' REPLY BRIEF

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REPLY

In her Brief in Opposition to the Petition for a Writ of Certiorari, Respondent erroneously, and without explanation, attempts to impose upon Petitioners the burden of showing that the error committed by the trial court was not harmless. Further, Respondent advances other arguments in her Brief which compel a Reply.

Respondent asserts at page 10 of her Brief that Petitioners' case must fail because:

> "[P]etitioners have failed to explain and prove to this Court how they have been prejudiced.... It may very well be that the jury never considered or included attorney fees in their award."

Such argument by Respondent ignores the well settled rule that erroneous rulings embodied in instructions to the jury are presumptively prejudicial and impose upon the party in whose favor the error was committed the burden of showing that the

error was harmless. In Fillippon v. Albion Vein Slate Co. (1919) 250 U.S. 76, 82, this Honorable Court held:

> "[I]n jury trials, erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury, and furnish ground for reversal unless it affirmatively appears that they were harmless (emphasis added)."

In McCandless v. United States (1936) 298 U.S. 342, 348, this Court reaffirmed the rule of Fillipon and held that the "harmless error" rule then embodied in the Judicial Code did not alter the presumption that erroneous instructions are prejudicial. And see Bihn v. United States (1946) 328 U.S. 633; Williams v. Great Southern Lumber Co. (1928) 277 U.S. 19; United States v. River Rouge Improvement Co. (1926) 269 U.S. 411.

The rule that erroneous instructions are presumptively prejudicial has been applied in civil actions of varying types. In Northern Pacific Railway v. Herman (9th

Cir. 1973) 478 F.2d 1167, the plaintiff presented two independent theories of recovery and the Court erred in its instruction to the jury with respect to one of the two theories. Finding that there was nothing in the record which revealed upon which theory the general verdict was based, the Court of Appeals held that the record was insufficient to show that the error was harmless. In Gaillard v. Boynton (1st Cir. 1934) 70 F.2d 552, 558, the trial court's jury instruction erroneously included specific elements of damages recoverable against the defendant. Pursuant to the presumption that the error was prejudicial, the First Circuit Court of Appeals rejected the assertion that the error was harmless, stating:

> "In view of the fact that this error involved the inclusion of the specific elements of damages which were not proper, we are unable to say that the error was harmless."

In the case at bar, the trial court erroneously charged the jury on the inclusion of attorney fees as punitive damages and the jury returned a Three Hundred Thousand Dollar ($300,000.00) punitive damage verdict. In view of the foregoing legal authorities and the circumstances of this case, it must be presumed the erroneous instruction was prejudicial. Respondent's attempt to shift to Petitioners the burden of proof on the issue of prejudice is without adequate legal foundation.

The record in this case is sufficient to demonstrate that the erroneous instruction involved Petitioners' substantial rights, it is insufficient to sustain Respondent's burden of overcoming the presumption that the instruction was prejudicial. Respondent's assertion that Petitioners are unable to show from the record the amount actually awarded by the jury as

attorney fees only underscores the weakness of Respondent's own legal position on this issue and shows Respondent cannot sustain her burden of demonstrating the error was harmless.

Further, upon this record there is simply no basis for Respondent's assertion that the prejudicial effect of the erroneous instruction was remedied by the trial court when the trial court remitted One Hundred Twenty-five Thousand Dollars ($125,000.00) of the punitive damage award. Because there was no evidence of the reasonable value of Respondent's attorney fees, it is pure speculation that the One Hundred Twenty-five Thousand Dollars ($125,000.00) remittitur was sufficient to alleviate the prejudice inherent in the trial court's instruction on attorney fees. So too, the Court of Appeals below speculated when it found that the remittitur was as a matter of law suffi-

cient to eliminate the prejudice resulting from the error in the instruction.

Respondent, at page 12 of her Brief, implies that the Supreme Court of Ohio has considered the constitutionality of the rule which precludes proof of attorney fees in cases involving punitive damages. However, neither review of the Ohio cases cited by Respondent, nor legal research by Petitioners reveal that the Ohio rule has been subjected to constitutional scrutiny. None of the other cases cited by Respondent in support of the rule precluding evidence of attorney fees consider the issue on constitutional grounds. These cases do demonstrate, however, that the issue raised in the case at bar is of national scope, with ramifications in jurisdictions other than Ohio.

Lastly, Petitioners submit that the alleged "facts" set forth by Respondent in her Statement of Facts (in a transparent

effort to paint a "horror story" and prejudice Petitioners) are simply not material to the only and narrow issue presented herein, to wit: whether the United States Constitution protects civil defendants against awards of attorney fees as punitive damages where there has been a total failure of proof as to the reasonable value of such fees. The inclusion of these irrelevant factual allegations by Respondent should be viewed by this Court with disapproval.

For the foregoing reasons, and for the reasons set forth in support of the Petition for Certiorari, the arguments advanced by Respondent should be rejected and Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, LOUIS H. ORKIN, Counsel for Petitioners, Max A. Strauss and Abbey Nursing Home, Inc., and a member of the Bar of the Supreme Court of the United States, certify that on September 12, 1984, I served three copies of the foregoing Reply Brief on Nicholas M. DeVito, Esq., Attorney for Respondents, by delivering the same to his office at 1000 Terminal Tower, Cleveland, Ohio 44113.

LOUIS H. ORKIN, ESQ.
Counsel of Record for Petitioners